

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6094

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA,

Libellant

v.

ONE 1975 CADILLAC ELDORADO COUPE
NEW YORK STATE REGISTRATION
560-EVN, REGISTERED TO TOMMIE
KENNETH SAUNDERS,

Libellee.

Docket No. 75-6094

BRIEF FOR LIBELLEES - *Appellant*

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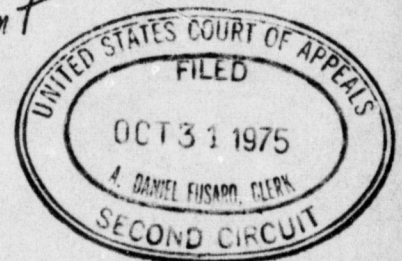


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BRIEF FOR LIBELLE

PRELIMINARY STATEMENT

This is an appeal from a final decree of condemnation made herein by the Honorable John T. Curtin, United States District Judge for the Western District of New York, on the 12th day of August, 1975, and filed on the 13th day of August, 1975, which said decree was based upon a decision and order of the said Judge Curtin, which said decision and order was made, granted and entered in the Office of the Clerk of the United States District Court for the Western District of New York, on the 5th day of August, 1975.

The order of condemnation and the decision and order upon which it was based, arose out of a libel action, commenced by

libellant against a certain 1975 Cadillac Eldorado Coupe, bearing New York State registration 560-EVN and registered to one Tommie Kenneth Saunders.

The vehicle was seized by United States Secret Service Agents on the 14th day of March, 1975, under the authority of 49 U.S.C. 781 and 782.

In the action below the Government contended that the vehicle was used to facilitate the transportation and sale of counterfeit monies.

The libel was tried before the Honorable John T. Curtin on the 2nd day of May, 1975. By its decision, as aforesaid, the Court below held that the vehicle was used to facilitate the transportation and sale of counterfeit monies, and directed the entry of a decree of condemnation and forfeiture.

STATEMENT OF FACTS

The facts as found by the Court below, and as set forth in pages 2-4 of the decision and order dated August 5, 1975, are as follows:

"The owner of the vehicle, who is also under criminal indictment, is Tommie Kenneth Saunders, a resident of Buffalo, New York. On March 4, 1975, Secret Service Agent Robert Pochopin, acting in an undercover capacity, purchased a quantity of \$10 counterfeit Federal Reserve notes from Mr. Saunders. After that purchase, the agent talked to Saunders about buying some more counterfeit money. As a result of several telephone calls, a meeting was arranged for March 14, 1975 at the Major Brands gas station located at 1625 Fillmore Avenue in Buffalo, operated by Saunders and Julius Blazer. Saunders telephoned Pochopin on that day and arranged to meet him at the station at about 4:30 p.m. so that Saunders could sell \$3,000 in counterfeit \$10 bills to the agent for \$1500. Other agents took up surveillance posts in the vicinity. They observed Saunders drive away from the station at about 4:00 p.m. in a white 1975 Cadillac Eldorado, which is now the subject of this lawsuit. Agent Patrick Finnerty followed the Cadillac from the station to Saunders' residence on Oakgrove Street, two or three miles away. Saunders was accompanied on the trip from the station to Oakgrove by his partner. According to Blazer's testimony, it was a daily routine to drive to the Major Brands office at about 4:00 p.m. to drop off the proceeds. The weather on that afternoon was especially bad. It was windy, snowing heavily and the streets were very slippery. Blazer testified that because of the bad conditions, they drove to Oakgrove to pick up an older vehicle, rather than drive the Cadillac to the Major Brands office. However, upon arriving, they found the other vehicle was in use and not available. Saunders went up to his house briefly, ostensibly to open the door for his son who had returned from school. He denies entering the house, and Agent Finnerty was not at a vantage point to see. Blazer went into the home of a friend who lived across the street. Blazer testified that he called the Major Brands office and left a message that, because of the bad weather, they could not bring the records in that day but would do so the next day. Saunders drove across the street, picked up Blazer and returned to the station. When Saunders returned to the gas station, he parked a few feet to the north of

the building. At this time Agent Pochopin was parked in the station area to the south. He testified that Saunders got out of the Cadillac and proceeded directly across the open station area to his vehicle, with an object in his hand as he crossed this area toward the agent's car. He entered Pochopin's car, opened a newspaper in which the counterfeit \$10 notes were contained, and delivered them to the agent. The movement of Saunders was confirmed by the other agents in the area. The witness for Saunders testified that when he got out of his car, he entered the station briefly and then walked to the agent's automobile. The surveilling agents were all in good position to observe the activities at the station and the court credits their testimony. A prearranged signal was given, Saunders was arrested and his Cadillac was seized pursuant to 49 U.S.C. §§781 and 782."

It was libellee's contention below, and it is his position in this Court that the facts as found by the trial Judge are insufficient to establish that the subject vehicle facilitated either the transportation or the sale of the alleged counterfeit monies.

In his findings the trial Judge deemed it unnecessary to determine whether Saunders had the money on his person from the time he originally left the gas station. This is manifested by the following portion of his decision:

"It is immaterial whether he drove to his home, picked up the counterfeit money there, or got it from Blazer after Blazer went into the house, or had the money in his possession from the time he originally left the station. Assuming any of these alternatives the Cadillac was used to meet with the agent at the time of appointment." Decision p. 5-6

It is apparent from reading the Court's decision that no finding was made as to when Saunders acquired custody of the counterfeit monies, since the Court below attached significance only to the fact that under the evidence which he accepted, Saunders had the money when he left the Cadillac and made his rendezvous with the undercover agent.

STATEMENT OF ARGUMENT AND QUESTION PRESENTED

Libellee-Appellant submits that mere use of a vehicle in connection with criminal activity is not enough to constitute a violation of 49 U.S.C. 781, and that such use must be essential to the development or operation of the criminal scheme or plan contemplated in order for it to amount to facilitation within the meaning of such statute.

In the instant case, no specific finding was made as to how or under what circumstances the counterfeit monies became connected with the libeled vehicle. The Court acknowledged the existence of three possibilities and stated that it was immaterial which one of the three was the fact. One possibility recognized by the Court was that Saunders had the contraband on his person when he left the gas station subsequent to his making an appointment to meet the undercover agent. Since his leaving the gas station was in no way connected with the contemplated criminal activity and bore no relation to it, the use of the vehicle was unnecessary to further the criminal scheme.

The question to be resolved on this appeal is whether a vehicle can be described as a facilitating agency within 49 U.S.C. 781, when its use has no connection with the object of the criminal activity, and it becomes related to the criminal activity only because the owner of the vehicle has contraband on his person during the period of unrelated use?

If the foregoing question is resolved in favor of libellee, the decision of the Court below must be reversed.

POINT I

TO CONSTITUTE A VIOLATION OF
49 U.S.C. 781, THERE MUST
EXIST A CAUSAL CONNECTION BE-
TWEEN THE USE OF THE LIBELED
VEHICLE AND THE PROSCRIBED
CRIMINAL ACTIVITY.

In determining whether an activity has been facilitated by a particular device, we cannot look at the use of the device in a vacuum from the activity. One of the common dictionary definitions of facilitate is the Webster definition:

"To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task."

Applying this definition to the instant case, to be subject to forfeiture the use of the libeled vehicle should have been employed to make the delivery of the money less difficult. If, however, Saunders had the counterfeit money on his person when he telephoned the undercover agent and told him to meet him at the very place from which he telephoned, his use of the vehicle to take a side trip, completely unconnected with any criminal activity, and then return to the point of rendezvous, had nothing to do with facilitating or making easier the transfer and delivery of the counterfeit money.

The Court below, in attempting to distinguish United States v. 1971 Chevrolet Corvette, 496 F. 2d 210 (5th Cir. 1974), quotes the following language from the decision:

"It is commonly stated that any use of an automobile that makes easy or less difficult or lessens the labor of the handling of contraband constitutes facilitation within the meaning of §781." p. 5

It is submitted that if Saunders had the contraband on his person upon leaving the gas station, knowing that he was going to return to that very place to deliver the contraband, then his use of the vehicle could not be considered as making the handling of the same less difficult or lessening the labor.

In United States v. LaVecchia, 513 F. 2d 1210 (2nd Cir. 1975), this Court found that the defendant's use of his automobile was a necessary part of a transaction involving the sale and delivery of counterfeit money, and pointed out that the complex delivery plan adopted by the principals necessitated that they travel quickly about the city and that the use of the vehicle was necessary to find a party whose presence was essential for the consummation of the transaction.

We submit that in the instant case, the delivery plan adopted was not complex and did not necessitate the use of the Cadillac automobile by Saunders.

The use to which the vehicle was put in the instant case bears no more relationship to the ultimate criminal transaction and possibly bears less relationship to the ultimate criminal transaction than the use in United States v. One 1971 Chevrolet Corvette automobile, supra; Howard v. United States, 423 F. 2d 1102; and United States v. One 1970 Buick Riviera, 374 F. Supp. 277.

In United States v. One 1970 Buick Riviera, supra, the Court held that the use of a vehicle to transport someone to an airport where he was furnished money for the purpose of traveling out of

the country to make a heroin purchase, did not constitute facilitation within the meaning of the statute.

Based upon the foregoing it is respectfully submitted that for the use of a vehicle to facilitate the transportation or delivery of counterfeit monies, it must be established that the use of the vehicle was an essential link in the entire transactional chain. In the instant case, if the counterfeit monies were on Saunders' person when he called the undercover agent, the use of the automobile was not an essential link in the chain which ultimately transferred the funds to the Government agent. Therefore, the instant situation would be readily distinguishable from that which obtained in LaVecchia, supra; and should be governed by the principle enunciated in United States v. One 1971 Chevrolet Corvette, supra.

It is, therefore, submitted that the Court below erred in not making a finding as to when the counterfeit money came into the possession of Saunders.

CONCLUSION

The determination of the Court below should be reversed.

Respectfully submitted,

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KENNETH SAUNDERS

Libellee

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SALTEN RODENBERG, being duly sworn, deposes and says:

That on October 29, 1975, he served upon the United States Attorney at the United States Courthouse, Buffalo, New York, copies of Brief for Libellee and Appendix of Libellee on the above-entitled matter.

Salten Rodenberg
Salten Rodenberg

Sworn to before me this

29th day of October, 1975

Suzanne M. Brownstein
Comm. of Deeds, Buffalo, N.Y.
My Comm. Expires 12-31-75